

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1140 OF 1991

IN THE MATTER OF THE ESTATE OF TIMOTHY MWAURA NDICHU – (DECEASED)

PHILIP NGETHE MWAURA.....APPLICANT/OBJECTOR

VERSUS

MARGARET WANJA MWAURA.....RESPONDENT

RULING

1. The deceased Timothy Mwaura Ndichu died on 7th September 1991. He left a written Will which was executed on 7th April 1975. The named executor of the Will was his widow Margaret Wanja Mwaura (the respondent). He bequeathed his estate to the respondent and to his five sons and two daughters. The respondent petitioned the court for the grant of probate which she was issued with on 28th September 2018.

2. The applicant Philip Ngethe Mwaura filed this application dated 20th April 2021 seeking to have the grant revoked and/or annulled. His case was that the deceased had a first house which had 6 children, him included. First, the deceased had not included them in the Will, and therefore had disinherited them. Secondly, the respondent, in applying for the grant of probate, had not sought their participation and/or their consent. If the grant is not revoked, it was claimed, the applicant and his siblings will be deprived of their benefit in the estate of the deceased.

3. There is no dispute that the affidavit in support of the application was sworn by the applicant's advocate Norah A. Owino. In the replying affidavit, the respondent took issue with the advocate having sworn the supporting affidavit, instead of the affidavit being sworn by the applicant himself. Her case was that the advocate had deponed to matters that were contentious, which she was prohibited by **rule 9** of the **Advocates Practice Rules** from doing. The contentious issues included whether the deceased had another house and whether he had other children. Then, whether the children, including the applicant, named in paragraph 8 of the supporting affidavit, were children of the deceased. That notwithstanding, it was the respondent's case that once she was named as the executor of the deceased's Will she was obliged to petition for the grant of probate. Secondly, there was no way she would have included the applicant or his family in the petition when the Will had not made reference to them. Lastly, if the contention by the applicant was that the Will was not valid because it had not provided to him that was not a good ground for invalidation.

4. In my ruling dated 8th April 2020 following objection by the applicant to the making of the grant, I reiterated the legal position that a Will cannot be invalidated merely because it did not provide for a member of the family; that such member is at liberty under **section 26** of the **Law of Succession Act (Cap 160)** to seek provision from the estate. If the court is satisfied, it will adjust the Will by providing for him.

5. Secondly, the respondent was bound to proceed under the powers in the Will to petition for the grant of probate. If the deceased had identified his family in the Will, it was not for the respondent to reduce or enlarge it. In any case, upon being granted probate she is obliged to seek confirmation. It is at that point that the issue of identifying the beneficiaries can be dealt with. That is if any person complaining that he was excluded has moved the court under **section 26** of the **Act**.

6. The serious point, however, is that the applicant's advocate has deponed to matters in contention. Under **rule 9** of the **Advocates Practice Rules**, the advocate could only depone to agreed matters or on purely legal matters, but not on contentions matters of facts (**Magnolia PVT Limited –v- Synermed Pharmaceuticals (K) Ltd [2018]eKLR**). Secondly, there was no effort on the part of the advocate to explain why it became necessary for her to swear the replying affidavit on her client's behalf. Was it that the client was not easily obtainable? (**Kamlesh M.A. Pattni –v- Nasir Ibrahim Ali & 2 Others, Civil Appeal No. 354 of 2004**).

7. That being the case, I find that the supporting affidavit to the applicant was not admissible and is hereby expunged from the record. The result is that the application was incompetent for want of a supporting affidavit. It is struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2021

A.O. MUCHELULE

JUDGE